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In the Supreme Court of the United States

OCTOBER TERM, 1975

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondents argue (Br. 9–11) that the summaries of the Air Force Academy Honor and Ethics Code cases are not "personnel * * * files" within the meaning of Exemption 6 of the Freedom of Information Act, and accordingly that the issue whether the files are exempt from production without a further showing that their disclosure "would constitute a clearly unwarranted invasion of personal privacy" is not presented in this case. The argument apparently is that because copies of the summaries are "posted on bulletin boards" and "disseminated to other employees for didactic purposes or because of general intra-agency administrative considerations * * * they cannot reasonably be considered 'personnel files' under exemption 6" (Br. 10–11).

Respondents' argument is based upon a misconception of the nature of the summaries and the function they serve at the Air Force Academy. They are not merely utilized to enable cadets and others to be kept informed of the interpretation and application of the Honor and Ethics Codes to particular cases. To the contrary, they are the basic record of the results of the proceedings of the Honor and Ethics Committees that handle disciplinary cases at the Academy arising out of alleged violations of the Honor and Ethics Codes (App. 107, 164).

The summary is an integral part of the personnel record of a cadet against whom an Honor or Ethics Committee proceeding has been brought, and it is the official record reflecting the outcome of the proceedings. As such, it is just as much a part of the Academy's personnel records relating to cadets as the transcript of a cadet's academic grades or an evaluation of his performance of his military duties.

The Honor Committee does "not have verbatim or even summarized records of its proceedings, and the only 'records' [are] brief, one-page summarizations of each case which were provided only to the cadet honor representative from each of the forty cadet squadrons for internal purposes related to training and administration of the Honor Code by the cadets themselves" (App. 164). Thus, these documents are not summaries of Committee proceedings in the sense that one might make a summary of testimony or of an opinion or a report, but rather are the end product, the actual decision, of the proceeding itself. They are precisely the kind of records that exemption 6 intended to exempt

from disclosure as "personnel * * * files," because they are "detailed Government records on an individual which can be identified as applying to that individual * * *" (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)).

The fact that copies of some of the summaries are distributed and used within the Academy for instructional and informational purposes [1] does not alter the

[1] Respondents state (Br. 2) that the summaries "are posted at forty different locations at the Academy * * * and * * * are available for inspection by, and discussion among, Academy cadets, faculty and administration." This statement, however, gives a distorted impression of the basis upon which the summaries are distributed and their availability for inspection by personnel at the Academy.

The summaries are not posted indiscriminately on bulletin boards throughout the Academy for all to see. Instead, a copy is distributed to the cadet Honor representative in each of the 40 cadet squadrons (App. 164). The summaries are posted on the squadron bulletin board and are covered "with a cover sheet which states 'Honor Case Summary—For Official Use Only'" (App. 177). The Academy has advised us that the squadron bulletin boards are located in restricted areas not open to the public generally. In cases where the Honor Committee finds the cadet guilty, the cadet's name is included in the summary distributed to the squadrons; if the outcome of the proceeding is not guilty or discretion, so that the cadet continues in the Academy, his name is deleted before the summary is distributed (App. 177). In the latter two categories of cases, not all summaries are distributed, but only representative ones (App. 109).

Since every cadet has the obligation to honor and enforce the Honor and Ethics Codes (App. 48, 79), it is essential that significant Committee decisions interpreting and applying those Codes be brought to the attention of all cadets. The fact that copies of the summaries are used for this purpose is fully consistent with their character as personnel files.

character of the summaries themselves as "personnel * * * files." The critical inquiry is what the documents are, not what additional functions they may serve; and, for the reasons indicated, these documents are personnel files.

Respondents also argue (Br. 9) that Air Force Regulations "sharply distinguish" between personnel and medical files and "similar" files and "unambiguously define 'similar files' to include documents like Honor and Ethics Code case abstracts." The regulation, however, merely lists among the "[e]xamples of similar files" those "[c]ontaining * * * material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken or has been taken" (32 C.F.R. 806.5(g)(1)(ii)), App. 121–122). Since the regulation treats "material pertaining to personnel matters" as a "similar" rather than a "personnel" file, it is doubtful that the Air Force focused upon the distinction between these two categories with the same detailed analysis we have made before this Court. Moreover, it is far from clear that the general reference to "disciplinary action" was intended to cover the reports and unique proceedings conducted by Honor and Ethics Committees at the Air Force Academy.[2]

2. Relying upon a single passage in the House and Senate Committee Reports on the Freedom of Information Act, respondents argue (Br. 12–14) that the legislative history shows that Congress did not intend

[2] Indeed, Major Richard R. Lee, the legal adviser to the Honor and Ethics Committees, considered the summaries to be "a part of the individual cadet's personnel records * * *" (App. 160).

exemption 6 to cover all "personnel and medical files" but only those whose disclosure would involve a clearly unwarranted invasion of personal privacy. A more detailed examination of the legislative history, however, shows that Congress intended the invasion-of-personal-privacy provisions to qualify only the exemption for similar files and not that for personnel and medical files.

The predecessor bills to the Freedom of Information Act, introduced in the 85th, 86th and 87th Congresses, but on which no action was taken, all contained an exemption from disclosure for material "of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy," and made no explicit reference to personnel and medical files. S. 2148, 85th Cong., 1st Sess. (1957); S. 186, 86th Cong., 1st Sess. (1959); S. 1567 and 1907, 87th Cong., 1st Sess. (1961).,

The bill upon which the present Freedom of Information Act was based was introduced and considered in the First Session of the 88th Congress. That was S. 1666. It contained no explicit exemption either for personnel or medical files or for material whose disclosure would be a clearly unwarranted invasion of personal privacy. It required disclosure of all agency records except those: (1) specifically exempt from disclosure by statute; (2) specifically required by Executive Order to be kept secret for the protection of the national defense; and (3) constituting internal agency memoranda relating to adjudicatory and rule-making matters. This provision reflected the "belief that there was specific statutory authority in most cases to cover such things as personnel files, medical files * * *." S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964).

During Senate hearings on the bill, government agencies and witnesses objected to the absence in the legislation of a provision protecting personal privacy. See, *e.g.*, Statement of Robert M. Benjamin, Chairman of the Special Committee on Code of Administrative Procedure of the American Bar Association, Hearings on S. 1666, and S. 1663 (in part), before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 88th Cong., 1st Sess. 152, 157 (1963) (hereinafter 1963 Hearings). See, also, Statement of Howard Bell, Vice President, National Association of Broadcasters, 1963 Hearings, *supra*, at 88–92. Assistant Attorney General Schlei noted there was a wide "range and volume" of personal information, including personnel and medical information, in government files which would be unprotected. 1963 Hearings, *supra*, at 197–199. Many of the government agencies which commented on S. 1666 pointed to the lack of any protection of personnel and medical files from disclosure, and recommended that an exemption for such files should be added.[3] See, also, S. Rep. No. 1219, *supra*, at 11, 14.

After the hearings, S. 1666 was amended to provide an exemption from disclosure for "personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." S. Rep. No. 1219, *supra*,

[3] See 1963 Hearings, *supra*, Appendix, at 225–227 (Department of the Treasury); 254–255 (Department of Commerce); 261–263 (Department of Defense); 303–305 (National Aeronautics and Space Administration); 319–320 (Selective Service System).

at 2–3. The Committee Report explaining the amendment noted:

> In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[4] [*Id.* at 7.]

Both the language of the proposed exemption, under which the invasion-of-personal-privacy provision modified only "similar matter" and not "personnel files" or "medical files," and the Committee Reports indicate that Congress intended in that bill that personnel and medical files would be unconditionally exempt from disclosure and that similar files would be exempt only if their disclosure would clearly unwarrantedly invade personal privacy.

The Senate passed the amended version of S. 1666, 110 Cong. Rec. 17089 (1964), but the House took no action on the bill during the 88th Congress. The bill which became the Freedom of Information Act, S. 1160, was reintroduced during the first session of the 89th Congress. It made only minor changes in S. 1666, and contained the identical language now found in exemption 6: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

[4] Similarly, in the section-by-section analysis of S. 1666, the Committee Report stated that "[t]here is a general consensus that these 'personnel files' should not be opened to the public * * *." S. Rep. No. 1219, *supra*, at 14.

The only two changes the bill made in the language of exemption 6 were (1) the elimination of the commas between the three categories exempted from disclosure and the substitution of the word "and" so as to combine "personnel and medical files" into a single category (in S. 1666 they had been separate categories); and (2) the change of the third category from "similar matter" to "similar files." Neither of these changes reflects any intention to depart from the interpretation of the exemption set forth in the Senate Report on the previous bill, S. 1666, that personnel and medical reports were unconditionally exempt from disclosure.[5]

To the contrary, during the hearings on S. 1160, several agencies interpreted the language as providing an absolute exemption for personnel and medical files.[6]

[5] But see Davis, *Administrative Law Treatise*, § 3A.22, n. 94 (1970 Supp.), suggesting that the change from "similar matter" in S. 1666 to "similar files" in S. 1160 indicates that Congress rejected the view that "personnel and medical files" were to be treated differently from "similar files." We submit, however, that this minor change in language does not indicate that Congress intended to make that significant a change in the meaning of the exemption. Throughout its consideration of exemption 6, Congress was far from precise in labelling what type of information besides personnel and medical files was exempt. The Senate Report on S. 1666, S. Rep. No. 1219, *supra*, at 7, speaks of "similar record" being exempt, although the actual text of the exemption reads "similar matter." *Id.* at 17. Rather than altering the meaning of the exemption, the change to "similar files" was more likely intended to make the language of the exemption consistent.

[6] See Hearings on S. 1160, et al., before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965), Appendix and Exhibits, at 376 (comments of Comptroller General of the United States), 491 (comments of National Labor Relations Board), 495–496 (comments of Railroad Retirement Board).

Similarly, the Reports of both the House and Senate Committees support that view. See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Thus, the Senate Committee again noted, as did the earlier Report (S. Rep. No. 1219, *supra,* at 7), the great number of files containing personal information in the possession of such agencies as the Veterans' Administration, the Department of Health, Education, and Welfare and the Selective Service System, and stated that, rather than providing a specific statutory exemption for each agency, the Committee decided upon a privacy exemption covering all agencies. S. Rep. No. 813, *supra,* at 9. In explaining the general purpose of the bill, the Committee stated (*id.* at 3):

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as *medical and personnel records.* [Emphasis added.]

This legislative history shows: (1) that exemption 6 was inserted in the Freedom of Information Act because of apprehension that the earlier bills did not protect the confidentiality of personal matters in government files, including particularly personnel and medical material; (2) that the original text of exemption 6 provided an unconditional exemption for personnel and medical files and an exemption for those similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy; and (3) that exemption 6 as enacted, despite the minor

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changes in its text, was intended and understood to embody the same principle as the earlier version. Indeed, if invasion of privacy were the touchstone for all categories of material that exemption 6 covers, there would have been no need for Congress to have referred to personnel and medical records at all; it could simply have provided an exemption for all "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[7]

3. In response to our argument (Br. 17–22) that

[7] Respondents suggest (Br. 14) that if personnel and medical files are unqualifiedly exempt from disclosure, the government could avoid disclosure of non-confidential material by placing it in such a file. The courts, however, may examine *in camera* a personnel or medical file for the limited purpose of insuring that all the material therein is properly a part of such file. Cf. *Center for National Policy Rev. on Race & Urban Issues* v. *Weinberger*, 502 F. 2d 370, 375 (C.A.D.C.).

Respondents also contend (Br. 12) that three court of appeals decisions have held that personnel and medical files are exempt only if their disclosure would clearly unwarrantedly invade personal privacy. None of those cases, however, involves the distinction here involved between personnel and medical files on the one hand, and similar files on the other. All of them involved the disclosure of similar files.

Respondents endeavor to answer our point (our opening brief 13–14) that one reason that Congress provided an ~~unwarranted~~ unqualified exemption for personnel and medical files was the vast number of such files by stating (Br. 11, n. 3) that the personnel files to which we refer "are expressly protected by the Privacy Act of 1974 (Pub. L. 93–579, 88 Stat. 1896, 5 U.S.C. § 552(a))." Section 3 of the Privacy Act, 5 U.S.C. 552a(b)(2), however, prohibits agencies from disclosing personal information pertaining to an individual without the individual's consent, "unless the disclosure of the record would be—* * * (2) required under section 552 of this title." To the extent that personnel files are required to be disclosed under the Freedom of Information Act, they are not protected by the Privacy Act.

disclosure of the summaries would constitute "a clearly unwarranted invasion of personal privacy," respondents argue (Br. 19) that the "possibility" that "former cadet offenders may be identified would not be attributable to the disclosure of the edited summaries, but, instead, would result from the Academy's own practice of internally publishing summaries * * *." As the court of appeals correctly observed (Pet. App. 11A–12A), "[t]his approach, however, ignores certain practical realities," since—

> a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information. [Footnote and citation omitted.] For example, a senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection.

It is respondents' intention to make the summaries public, and not the Academy's limited distribution of them, which would create the real risk that dormant memories would be revived, and former cadets thereby suffer potentially devastating consequences (App. 157, 186).[8]

[8] Respondents imply (Br. 20) that this case involves a former cadet's "right to speak" about Honor or Ethics Code violations. But maintaining the confidentiality of the summaries does not prevent any former cadet from himself describing or discussing disciplinary episodes that occurred at the Academy.

4. Respondents contend (Br. 23) that exemption 2, which exempts from disclosure matters "related solely to the internal personnel rules and practices of an agency," was intended to cover only "internal matters relating to routine internal personnel considerations." They stress (Br. 24) that S. 1666 exempted from publication in the Federal Register "any matter relating solely to the internal management of an agency" and exempted from general disclosure material that "relate[s] solely to the internal personnel rules and practices of an agency;" and that the explicit exemption for "internal management matters" was eliminated from the bill that was enacted. They infer from this deletion that "Congress intended the FOIA's exemption for 'internal personnel rules and practices' to be narrower than the APA's exemption for 'internal management,' and, as the Senate Report reflects, to relate only to routine matters such as 'personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like' " (*ibid.*).

The "internal management" provision in S. 1666, however, was not an exemption from the general disclosure requirements of the Act but only from the requirement of publication in the Federal Register. Moreover, even if Congress intended the exemption for "internal personnel rules and practices" to be narrower than "internal management," that does not indicate that the former is intended to cover only such routine matters as the use of parking lots and sick leave. The phrase "internal personnel rules and practices" means what it says and, as developed in our

opening brief (pp. 22–26), the summaries deal with an important part of the Air Force Academy's internal personnel rules and practices, namely, those involving the observance and enforcement of the Honor and Ethics Codes.

Respectfully submitted.

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